

In re Interest of Luz P.

Caselaw No.

Nos. S-16-534

Filed on

Friday, February 10, 2017

SUMMARY: Lucia V. appeals from an order from the County Court for Buffalo County. In the current case, the trial court issued an order nunc pro tunc purporting to vacate its prior order, which terminated Lucia's parental rights to her five children. Without evidence in the record that a party did not receive notice of the prior order, an order vacating and reinstating a prior order cannot be used to extend the time for appeal. Therefore, the Supreme Court is without jurisdiction because there is an absence of a timely filed notice of appeal.

Lucia, lived with her children Luz P., Jonathan V., Esvin C., and Linsey C., and her boyfriend, Enrique C. Lucia came to the United States when Luz was 2 years old and left her and her older brother behind in Guatemala with relatives. When Luz was 14 she moved to Nebraska to live with Lucia, Enrique, and her younger siblings.

After living with Lucia and Enrique for a few months, Enrique began making sexual advances toward Luz. These sexual advances would occur on Saturdays while Lucia was at work. Enrique raped Luz on several different occasions.

In October, 2014 Lucia questioned Luz. After Luz told Lucia about the sexual assaults, Lucia became angry and did not believe her. Consequently, Lucia called physically and verbally attacked Luz by calling her names, hitting her with a mop, pulling Luz by her hair to the ground, slapping her, and beating her with a bent wire clothes hanger.

Lucia also threw Luz down to the floor, forcibly pulled of Luz's pants and underwear, and sat on her and forcibly spread her legs to put her fingers to Luz's vagina. After this interaction Lucia threw Luz out of the house.

According to Lucia's record, Luz left on her own, but Lucia did not call the police when Luz did not return.

Shortly after, Lucia went to Luz's high school to "unenroll" her. The school had a difficult time understanding exactly what Lucia needed and set up a time for the following week for Lucia to return when an interpreter could be present.

The following week when Lucia returned, she spoke to the resource officer and told him that "her daughter had run away, did not want to come to school, and was being uncooperative at home." She also stated that Luz had tried to have sex with Enrique.

The school resource officer filed a runaway report and communicated with other officers about the search for Luz. Lucia did not disclose any information about other relatives in the area to the school and instead told the school that Luz did not have any family and that she was unaware of where Luz would go.

School officials attempted to follow up with Lucia to gain more information in their search for

Luz. While researching, the school officials contacted Kearney Public Schools where they learned that Luz had a sibling that was enrolled in that school system. They also were informed that Lucia had an uncle that lived in Kearney.

Upon further investigation, the officers learned that Luz had been staying with the Uncle for 2 weeks during which she did not attend school. Lucia did not check with the Uncle while Luz was staying there.

Both Lucia and Luz were interviewed. Lucia told the police officer that "she believed her daughter was addicted to sex." Lucia's phone conversation in the interview room was overheard by an officer, "if the police talk to you, tell them you went to Guatemala to see your mother for heart surgery." It was later admitted by Lucia that this conversation was with Enrique.

There are numerous instances where Lucia instructed Luz to lie to officials and instructed Luz on what she should tell the officials.

The police obtained arrest and search warrants for Lucia and her home. Upon arrival at the residence, officials found a bent wire hanger and a Swiffer broom that police believed were used to beat Luz as well as hair in the trash can which was believed to have been pulled by Luz's head by Lucia. Lucia admitted that the broom was used to beat Luz.

Enrique was believed to have fled the country on October 24, 2014 by airplane.

All of the children, Luz, Jonathan, Esvin, and Linsey, were taken by DHHS and placed with a foster parent who have been providing childcare for the children.

Lucia was charged with the following: tampering with a witness, a Class IV felony; felony child abuse, a Class IIA felony; and first degree sexual assault of a child, a Class IB felony. Lucia pled no contest to tampering with a witness and felony child abuse. The sexual assault charge was dismissed.

Lucia was sentenced to 4 months' imprisonment on the witness tampering conviction and 1 year's imprisonment on the felony child abuse conviction. Lucia was released in August 2015 and subsequently deported to Guatemala.

While serving her sentence in April 2015, Lucia gave birth to a daughter, Eva. Eva was placed in the same foster home as her siblings. The State filed petitions to adjudicate all of the children under Neb. Rev. Stat. § 43-247(3)(a).

In August 2015, the State filed motions for termination of Lucia's parental rights to all five children. In December 2015, the court held a hearing on the State's motion to terminate Lucia's parental rights. Witnesses included; two police officers who worked on the case, two DHHS children and family service specialists who worked on the case, a therapist that worked with Luz and Jonathan, the children's foster mother, Luz, and Lucia.

The DHHS specialists and therapists both testified that it would be in the best interest of the children to terminate Lucia's parental rights. The foster mother testified that she would be willing to provide permanency for the children. Luz testified that she wanted to stay with her foster mother and was afraid that if she were to go back to Guatemala "they would kill me."

Lucia also testified by phone from Guatemala. In her testimony, Lucia noted that had been

seeing a counselor and that she a job. She indicated that she wanted her children to come to Guatemala.

Consequently, the county court granted the State's motions to terminate Lucia's parental rights. The basis of the ruling relied on § 43-292(9), that Lucia had subjected each of the children or a sibling of the children to "aggravated circumstances" and § 43-292(2), substantial and repeated neglect.

In conclusion, the court found that termination of Lucia's parental rights was in the children's best interests.

The court's consolidated order was issued on April 4, 2016. The order notes that a copy should be sent to the State's attorney Lucia's attorney, Jonathan's father's attorney, the court appointed special advocate, and DHHS. The certificate of service for the order indicates that the clerk sent notice of the order to the court-appointed special advocate; the Guatemalan consulate in Denver, Colorado; the guardian ad litem; and the State's attorney. There is no indication whether notice was sent to Lucia or her attorney.

On April 28, 2016, the court issued a consolidated order nunc pro tunc. This order stated that the Court had been informed that there was a flaw in the "E-Filing" system that the Court had used. Consequently, the mother's nor father's attorney had received notice of the Court's decision.

In an effort to correct the problem, the Court vacated its previous Order filed on April 4th, 2016, and now reissues that Order in all respects under April 28th to allow the parties an appropriate amount of time to contemplate the findings and perhaps file an appeal.

There is no evidence that shows that Lucia and her attorney did not receive notice of the court's April 4th order. On May 23rd, Lucia filed notices of appeal from the Court's April 28th order nunc pro tunc.

Neb. Rev. Stat. § 25-1912(1) requires that a notice of appeal be filed "within thirty days after the entry of such judgment decree, or final order" appealed from.

Applying that rule to the current facts, the order terminating Lucia's parental rights was entered on April 4, 2016 and the court entered an order nunc pro tunc purporting to vacate this order on April 28. Lucia filed her notices of appeal on May 23 which is within the 30 days of the April 28 order, but not within the 30 days of the April 4 order.

The issue addressed by the court was whether the April 28, 2016 order nunc pro tunc was a valid order by the court which extended the time for Lucia to appeal.

Based on case law in *Continental Oil Co. v. Harris* and *Ferry v. Ferry*, an order nunc pro tunc does not change the time to appeal the order of judgment that it amends, because it only corrects clerical or formal errors. Therefore, the court's April 28, 2016 order did not extend Lucia's time to appeal the termination of her parental rights.

Because there is no evidence in the record to establish that Lucia and her attorney did not receive notice of the court's order, the court's April 28 order was invalid and could not extend the time to appeal established by the Legislature. In conclusion, the Supreme Court is without jurisdiction and must dismiss these appeals.
